STATE OF MICHIGAN

COURT OF APPEALS

CAROL K. HANNER, formerly known as CAROL K. DUBOIS,

Plaintiff-Appellee,

v

MARTIN J. DUBOIS,

Defendant-Appellant.

UNPUBLISHED
March 25, 2003

No. 244244
Eaton Circuit Court
LC No. 98-001607-DM

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant sought sole physical custody of the parties' minor child, Aron DuBois, because of plaintiff's decision to relocate. Defendant appeals by right the trial court's order denying his petition seeking. We reverse and remand.

The parties' judgment of divorce granted the parties joint legal custody, but gave plaintiff sole physical custody. After plaintiff expressed an interest in moving the minor child from Eaton Rapids to her new residence in Tecumseh, defendant petitioned to change custody. In support of his petition, defendant contended that, due to his relationship with his child at his home, an established custodial environment existed that included his home. The trial court disagreed, thereby allowing the minor child to relocate to Tecumseh with plaintiff. Defendant appeals as of right.

Initially, we note that, in reviewing child custody disputes, there are three applicable standards of review. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). First, we review factual findings, such as the existence of an established custodial environment, under the great weight of the evidence standard. *Id.* A trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* Second, we review a trial court's discretionary rulings, such as the ultimate custody decision, for an abuse of discretion.[1] *Id.* Finally, we review questions of law for clear legal error. *Id.* at 20. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.*

[1] "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Under MCL 722.27(1)(c), a custody order may be modified on "proper cause shown" or a "change of circumstances." When the Legislature adopted MCL 722.27(1)(c), it "intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981). Because the existence of an "established custodial environment" determines the movant's burden of proof, the trial court's first task in reviewing a custody order is to determine whether an "established custodial environment" exists. *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001). "If the trial court finds that an established custodial environment exists, then the trial court can change custody only if the party bearing the burden presents clear and convincing evidence that the change serves the best interests of the child." *Id.* at 6. On the other hand, "if the court finds that no established custodial environment exists, then the court may change custody if the party bearing the burden proves by a preponderance of the evidence that the change serves the child's best interests." *Id.*

As noted above, defendant contends that the trial court erred in failing to conclude that an established custodial environment had been established in his home. The trial court opined in pertinent part as follows:

> Now, the evidence has been [sic] as to the custodial relationship is established by the court order. Certainly the parties have modified the parenting time of that court order. I don't find that the parties have changed the custodial relationship in [the] absence of a court order. The mother and the father have agreed on a certain parenting time that the child is exercising, which is different than the parenting time expressed in the court order. Now, in this Court's mind that does not constitute a change in custody. If it did, then what we've done is frankly send a very, very bad signal to parents, that is, you cannot and should not cooperate with one another and work together on parenting time because if you do, then you are going to be put into a different position than you would otherwise be. And that's not the type of message that this Court wants to send to parents.
>
> The message the Court wants to send to parents is frankly not talk in terms of custody, talk in terms of what quality parenting time each of you folks can have. And if in fact the message was to the parents that if you allow more parenting time than what is set forth in the custodial order, then you are going to in fact place yourself in a position where legally you are going to have a different burden to prove than you would otherwise have, and that's not the correct message.

Ultimately, the trial court ruled, as clarified during a later hearing, that the only established custodial relationship was with plaintiff (as per the custody order).

In determining whether an established custodial environment exists, MCL 722.27(1)(c) specifically provides as follows:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical

> environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

We have explained that an "established custodial environment is one of significant duration 'in which the relationship between the custodian and child is marked by qualities of security, stability and permanence.'" *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000), quoting *Baker, supra* at 579-580.

It is noteworthy, however, that an "established custodial environment" does not need to be "limited to one household." *Mogle, supra* at 197-198. In other words, an established custodial environment may exist in both parents' homes. *Id.* In fact, in *Foskett*, we noted that where there is an established custodial environment with both parents, the trial court is required to apply a "clear and convincing" standard of review, MCL 722.27(1)(c). *Foskett, supra* at 6.

In "determining whether an established custodial environment exists, it makes no difference whether that environment was created by a court order, without a court order, in violation of a court order, or by a court order that was subsequently reversed." *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). In fact, we opined that the custody order is "irrelevant" to the trial court's analysis of whether an established custodial environment exists. *Id.* Accordingly, here, the trial court placed entirely too much emphasis on the original custody order. Indeed, in light of the *Mogle* and *Hayes* decisions, defendant's status as the non-custodial parent certainly should not prevent a finding that an established custodial environment existed that also involved his home.

Indeed, the evidence strongly suggested that the minor child looked equally to both parents for guidance, discipline, the necessities of life, and parental comfort. MCL 722.27(1)(c); see *Foskett, supra* at 7-8. In fact, the trial court's findings regarding the equality of the parties in regard to the best interest factors belies its conclusion that a custodial environment existed only in plaintiff's home. Again, at least part of the trial court's error was placing too much emphasis on the original custody order. *Hayes, supra* at 388. Ultimately, we conclude that the evidence clearly preponderated in favor of a finding that an established custodial environment existed in both homes. *Phillips, supra* at 20. Consequently, we reverse the trial court's finding that an established custodial environment existed solely with plaintiff.[2]

---

[2] On remand, the trial court "should consider up-to-date information," including the minor child's "current and reasonable preferences" and the fact that he has been living with plaintiff during the appeal. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). Although allowing the trial court to consider these facts may not appear, at first glance, to be "fair" to defendant, it is worth stressing that the primary concern is determining what is in the minor child's best interests. However, the *Fletcher* Court cautioned that the events that have taken place during this appeal cannot operate to create a new custodial environment in plaintiff's new home. *Id.* at 889 n 10. Instead, on remand, the trial court should consider whether either party has demonstrated by clear and convincing evidence that modifying the established custodial environment in both homes is in the minor child's best interests. *Id.*; MCL 722.27(1)(c).

Defendant also challenges the trial court's rulings on several of the best interest factors, MCL 722.23. As noted above, we review a trial court's factual findings to determine whether they were against the great weight of the evidence. See *Phillips, supra* at 20.

Initially, we agree with defendant's contention that the trial court erroneously failed to consider MCL 722.23(c). As a general rule, "the trial court must consider and explicitly state its findings and conclusions regarding each factor, and the failure to do so is usually reversible error." *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). However, having already concluded that a remand is appropriate, we need not determine whether the trial court's failure to consider this factor, standing alone, constituted an error requiring reversal. On remand, the trial court should, of course, make an explicit finding on this factor.

Defendant also contends that the trial court's finding regarding MCL 722.23(h) was against the great weight of the evidence. Under MCL 722.23(h), the trial court is to consider the "home, school, and community record of the child." Here, the trial court found that "the child is doing well and frankly will do well no matter where the child attends school." However, the trial court also found that the minor child wanted "to attend the Eaton Rapids School." Given that the minor child was doing well at that school, and wanted to remain there, we can only conclude that the evidence clearly preponderated in favor of this factor supporting the then-existing custodial environment, were that possible to continue, or, if not, then the proposed sole physical custody in the father. *Phillips, supra* at 20. Indeed, while it may be true that the minor child is strong-willed and capable of making the best out of the new school district, that does not necessarily mean that it is in the best interests of the minor child to force him to do so. Accordingly, we reverse the trial court's finding on this factor.

Next, defendant challenges the trial court's finding on factor (i), MCL 722.23(i), which involves the reasonable preference of the child. The trial court found that the minor child had a strong preference to stay with his mother. Indeed, the trial court found that the minor child had "a very strong feeling about residing with his mother." On the other hand, the trial court recognized that the minor child wished that he could "clone himself," so that he could continue to spend time with both parties. We believe that these findings are internally inconsistent.

The trial court also stated that the minor child "knew" that he could not live with his mother and continue to spend time with both parties. If so, we believe that the child's statement did not reflect a preference between the established joint custodial environment and the proposed custodial environment, but reflected a preference between living with his mother in Tecumseh and living with his father in Eaton Rapids. Either of these choices was a preference that already reflected a change in the established custodial environment. In fact, we believe that the trial court's findings plainly indicate that the minor child's true preference would have been to maintain the status quo—the established joint custodial environment. Consequently, we agree with defendant's contention that the trial court's finding on factor (i) was against the great weight of the evidence. *Phillips, supra* at 20.

Accordingly, we conclude that the trial court erroneously failed to consider one factor and made erroneous findings on two other factors. We note that the remaining factors were even. As such, we are not persuaded that clear and convincing evidence supported a finding that modifying the established joint custodial environment was in the minor child's best interests. However, the trial court's original ruling has been implemented for some time now, and it is

possible, although not necessarily the case, that the changes that have taken place are relevant to the best interests inquiry. See *Fletcher, supra* at 889; MCL 722.23(l). Consequently, we merely remand this matter for further proceedings consistent with this opinion.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens

[3] Although we are sympathetic to plaintiff's desire to, using the trial court's terminology, "get on" with her life, the best interests of the minor child must be her primary concern. In our opinion, breaking the (very beneficial to the child) status quo to move to Tecumseh was a decision reflecting *her* best interests, not the best interests of the minor child.